APPENDIX

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the aggravating factors from the *Fleenor* decision which are not present in the instant case. In *Fleenor*, unlike in the case at bar, documentary evidence proved that sales figures had been altered, crossed out and arbitrarily reduced so that plaintiff received a lower sales commission than she had earned. The trial court then thoroughly considered the *BMW* and *Hammond/Green Oil* factors [1] and significantly reduced the punitive damages. In this case, however, Judge Galanos did not go far enough in ordering remittitur.

B. Sparks's Punitive Damages Verdict Should Be Set Aside Entirely or Substantially Remitted From $225,000

An analysis of the *BMW* and *Hammond/Green Oil* factors, as performed by the trial court, demonstrates that Sparks's punitive damage verdict should be vacated in its entirety or substantially remitted. Cash America respectfully requests that this Court consider the evidence in light of the following factors and either vacate or substantially remit this punitive damages verdict well below $225,000.

(1) Lack of reprehensibility of conduct

As the trial court noted, in *BMW*, the United States Supreme Court found that the most important indicium of reasonableness of a punitive damage award is the degree of reprehensibility of the defendant's conduct. *BMW*, 116 S.Ct. at 1599. Not every punishable act is "sufficiently reprehensible to justify a significant sanction in addition to compensatory damages. . . . [P]unitive damages may not be grossly out of proportion to the severity of the offense." *Id.*

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[1] *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986); *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989).

This is not a personal injury case. Sparks's claims are "purely economic in nature," *id.*, and involved "no death or serious bodily injury, no praying on vulnerable victims, no breach of fiduciary duty, no wicked purpose of unjust self-enrichment or malicious harm. It evinced no indifference to or reckless disregard for the health and safety of others." *Id.* Like BMW, Cash America is not a "recidivist," and there is not a scintilla of evidence or any basis for concluding that the alleged punishable conduct involved "intentional malice." *Id.*

The trial court emphasized the absence of reprehensibility in Cash America's conduct, noting the dearth of evidence of any concealment or "cover-up" of malicious conduct. Sparks argued that certain numerical notations in Ewing's day-planner indicated that Ewing intended to "steal" Sparks's bonus. The trial court concluded, however, that Ewing's dayplanner was "inconclusive." Emphasizing that Sparks never gave Cash America an opportunity to remedy the alleged wrong, the trial court wrote:

> The defendants provided the plaintiff with all the financial and statistical information related to the bonus payments which he requested. Further, the defendants attempted to meet with the plaintiff on several occasions to discuss the problems that had arisen regarding the bonus payment. The plaintiff admittedly refused to meet with the representatives of Cash America.

Judge Galanos found that "this factor weighs against the plaintiff in this court's analysis of the reprehensibility of the defendants' conduct." This verdict is particularly egregious when compared to other post-*BMW* cases in which this Court has ordered substantial remittitur. *See, e.g. Ford Motor Co. v. Sperau*, 708 So. 2d 111 (Ala. 1997) (remitting $6,000,000 punitive award to $1,792,000 in case involving intentional fraud which cost African-American dealer his lively-hood); *Life Ins. Co. of Georgia v. Johnson*, 701 So.2d 524 (Ala. 1997) (reducing punitive award from $5,000,000 to

$3,000,000 in case involving a defendant's statewide scheme to sell worthless medicare supplement insurance policies to "some of the most vulnerable members of our society"); *American Pioneer Life Ins. Co. v. Williamson*, 704 So.2d 1361 (Ala. 1997) (reducing punitive award from $3,000,000 to $750,000 in case involving scheme to force insurance agent to forfeit commissions because policyholder had changed to another insurer's policy).

(2) Relationship between the punitive damages and the plaintiff's injuries

As is discussed above, this is a pure economic harm case. Even accepting plaintiff's breach of contract claim, plaintiff could not have suffered more than $25,000 in compensatory damages. Plaintiff's claims for mental anguish are not supported in the Record, as discussed herein at pp. 71-76, *infra*. Cash America's conduct was innocent and, once it became apparent to Cash America that Sparks was having problems, Cash America attempted to meet with Sparks and provide him support services, but Cash America was rebuffed on several occasions.

There is no evidence of reprehensibility in this case. Having before it no evidence of reprehensibility, therefore, this Court should reverse the trial court and vacate Sparks's punitive damage award or substantially remit this verdict well below $225,000. In remitting this verdict, the trial court applied a 3:1 ratio of punitive to compensatory damages. It is respectfully submitted that, while the trial court was clearly correct in remitting this verdict, the remittitur does not go far enough. In no event would the evidence in this case support a ratio greater than 1:1 of actual compensatory damages (in no event more than $25,000) to punitive damages in view of the complete lack of aggravating factors adduced at trial.

(3) Legislatively established fines for comparable conduct

There are no legislatively established fines for failing to pay the particular discretionary incentive bonus amount demanded by an employee.

(4) Profitability of the defendants' conduct

Sparks contends that he "earned" $25,000 more than he was paid as a 1995 9-month incentive bonus. Even if Sparks were correct, any punitive damage award in excess of $25,000 would remove the alleged profitability from Cash America's conduct in setting Sparks's bonus at $7,500.

(5) Defendants' financial condition

Cash America acknowledges that it is a large corporation which could withstand the excessive punitive damage verdict without going out of business. However, Cash America notes that its financial condition was presented improperly to the jury during Sparks's counsel's closing argument in an effort to inflame the jury. This well may have been a factor in causing this jury to function improperly.

Taking into account all of the above considerations derived from *BMW* and *Hammond/Green Oil*, it is abundantly clear that no aggravating factors exist in this case which would justify the excessive punitive damage verdict, even as reduced by the trial court. The punitive damage verdict should be vacated in its entirety. Certainly, this economic harm case does not justify a punitive damage award which goes beyond the 1:1 ratio of punitive damages to actual compensatory damages, which in this case cannot be more than $25,000. Cash America respectfully requests that this Court vacate in its entirety or substantially reduce Sparks's punitive damage verdict to no more than $25,000.